IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1128 of 1998

Bank of India **..Appellant**

versus

Tanaji A. Lokare & ors. ..Respondents

Mr. K. M. Mody with H. P. Harsana i/b. M/s. Harshad & Co. for the Appellants.

Mr. G. S. Godbole for the Respondent No.2.

CORAM : D. G. DESHPANDE,J.

DATE : 5TH APRIL,2005

ORAL ORDER :

1. Heard counsel for the appellant and the respondent No.2.

2. The Bank of India appellant has filed this appeal even though the decree is passed in its favour by the trial court and their grievance is that the money decree should have been followed by a decree of foreclosure of mortgage and since that is not done, therefore, this appeal.

3. Counsel for the bank contended that the

defendants respondents and guarator defendants who did not appear or did not file their written statement, it has to be considered that mortgagee is guarantor to the bank and when money claim is decided in favour of the bank the decree for foreclosure should automatically follows.

4. Mr. Godbole for the respondent No.2 on the other hand contended that for passing a decree of foreclosure there has to be a preliminary decree, certain procedure has to be followed. Preliminary decree gives a right of appeal and since that procedure as laid down in Order XXXIV of Code of Civil Procedure, has not been followed, this court cannot now in first appeal pass a preliminary decree because that would deprive the respondents of their right to appeal to challenge the preliminary decree.

5. I find considerable force in the submissions made by Mr. Godbole. While passing a decree for foreclosure the court has to follow certain procedure, there has to be an issue in that regard, which the trial court has not framed in the instant case and unless that is done, there cannot be any decree for foreclosure. Therefore, this is a case where the matter is required to be remanded back to the trial court.

6. Suggestion for remand was given by me when the arguments of both the counsels were almost concluded, and therefore considering the legal obstacles, both the counsels did not seriously oppose suggestion for remand.

7. In the circumstances, I pass the following order :

ORDER

. Money Decree is kept as it is. But the matter is remanded back to the trial court for deciding the issue of mortgage and right of the bank for foreclosure. The Defendants including the guarantor defendant will be at liberty to file their written statement or amend their written statement in that regard only. The Trial Court will frame all issues regarding the said mortgage as are required by law to be decided with the right of the bank to foreclosure. Trial court will permit the parties to adduce evidence, if any, on those issues and will pass order according to law taking into consideration provisions of Order XXXIV of the Code ofCivil Procedure regarding preliminary and final decree of foreclosure, if any such decrees is or are required to be passed in the circumstances, the trial court may decide.

. The trial court will complete the trial in this regard and pass judgment within six months from receipt of this order.

. Parties to appear before the trial court on 25.4.2005.

. If R & P is received, the same be sent back to the trial court, immediately.

. Appeal disposed of accordingly.

5.4.2005 (D.G. DESHPANDE, J.)